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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

KEVIN WEBRE,

Plaintiff and Appellant,

v.

OCWEN LOAN SERVICING,
INC., et al.,

Defendants and
Respondents.

B287728

(Los Angeles County
Super. Ct. No. VC 056902)

APPEAL from a Judgment of the Superior Court of Los Angeles County, Lori A. Fournier, Judge. Affirmed.

Law Office of Jonathan A. Goldstein, Jonathan A. Goldstein for Plaintiff and Appellant.

McGlinchey Stafford, Kevin S. Kim, Brian A. Paino for Defendants and Respondents.

Defendant Ocwen Loan Servicing, Inc. (Ocwen) held two trust deeds on appellant Kevin Webre's property. Webre claims he entered into an oral agreement with Ocwen to consolidate his loans and eliminate the second trust deed. At the same time, however, Webre signed a written loan modification agreement that applied only to the terms of the first trust deed. Webre commenced this action. He principally argues Ocwen breached the oral agreement to modify both loans. The trial court ultimately granted defendants' motion for judgment on the pleadings with respect to Webre's operative second amended complaint, and entered judgment for defendants. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

1. Background Facts.¹

Webre owns real property located at 14829 Carnell Street in Whittier. The property is encumbered by two trust deeds, both dated September 15, 2005: a first trust deed securing a loan in the amount of \$448,000 (No. 877), and a second trust deed securing a loan in the amount of \$112,000 (No. 879).² Defendant Litton Loan Servicing LP (Litton) acted as the loan servicer for both loans. Litton assigned a second set of numbers to the loans: No. 436 (first trust deed) and No. 451 (second trust deed). In 2011, Litton transferred servicing of the two loans to defendant Ocwen.

¹ Our fact statement is principally taken from the second amended complaint and documents the court judicially noticed.

² For clarity, we refer to the last three digits of the loan numbers.

Webre alleged his loans were consolidated into one loan at an eight percent interest rate in July 2008. No such agreement was attached to the second amended complaint.

In May 2009, Litton recorded a notice of default on the first trust deed. On August 3, 2010, Webre filed a voluntary chapter 13 bankruptcy petition. Contrary to his assertion his loans were consolidated, he listed both loans on his bankruptcy schedules. In July 2011, after conversion of his case, Webre received a discharge of his unsecured debts under chapter 7.

In June 2012, Webre received a notice from defendant LCS Financial Services Corporation (LCS). LCS, which was the debt collector for Ocwen, informed Webre the first trust deed (No. 436) was in arrears in the amount of \$141,120.20.

In June 2013, a notice of trustee's sale on the first trust deed was recorded, evidencing an indebtedness of \$632,508.74. In July, 2013, Webre initiated a series of phone calls with Ocwen to avert the trustee's sale.

In the allegations most central to his claims, Webre asserts he spoke by telephone in November 2013 with Ocwen's agent, Sharon Williams. Ocwen orally agreed to a loan modification agreement covering both loans. The Second Amended Complaint alleges that the "modification would incorporate all existing mortgages," the "total monies owed" on the property would be the subject of the loan modification, and interest on the "modified loan" was at a two percent interest rate. The implication was that both loans would be consolidated.

The written loan modification agreement attached to the Second Amended Complaint is dated November 26, 2013, and references "the Mortgage, Deed of Trust, or Security Deed" and "the Note of same date and secured by the Mortgage," which

covers Webre's residence. Pursuant to the agreement, the principal balance of the trust deed was reduced to \$281,850, and the interest rate was lowered to two percent for the remainder of the loan. The loan modification agreement references a loan number, 789, that is different from the loan numbers used by Litton or LCS. However, contrary to Webre's allegations of a consolidation and payoff of the second trust deed, the loan modification agreement does not reference two loans, nor does it mention consolidation of two loans. Webre conceded at oral argument that the terms of the purported oral agreement were wholly inconsistent with the terms of the written loan modification agreement.

When Webre received the written loan modification documents, he believed they did not reflect the correct loan number. Webre spoke to Sharon William's assistant Kevin Dunn. Dunn assured him the written modification agreement encompassed both trust deeds on the property (Nos 436 and 451), and incorporated all monies owed.

In December 2013, Webre signed the loan modification agreement to hold off the foreclosure sale. The signing was based upon Ocwen's oral representations that the written agreement modified both loans and the second trust deed was extinguished.

Webre made all payments under the modified loan from January 2014 to July 2016. In May 2016, Webre first became aware the second trust deed, Loan No. 451, was allegedly in arrears in the amount of \$109,789.56. Additionally, a lien had been placed on the property. In August 2016, Ocwen sent Webre a form 1099-C showing a loan forgiveness of \$367,021.77.

In August 2016, Webre learned, contrary to Ocwen's alleged representations, the loan forgiveness did not encompass

the second trust deed (Loan No. 451.) LCS has continued to “harass” Webre in an attempt to collect the \$109,789.56 outstanding balance.

2. Procedural History

Webre commenced this action on October 31, 2016.³ After filing an answer, defendants moved for judgment on the pleadings. The trial court granted the unopposed motion with leave to amend. Webre filed a first amended complaint. Defendants again answered and moved for judgment on the pleadings. The trial court again granted the motion with leave to amend.

Webre’s operative second amended complaint alleged claims for (1) breach of contract, (2) breach of the covenant of good faith and fair dealing, (3) intentional misrepresentation, (4) negligent misrepresentation, (5) fraudulent concealment, (6) intentional infliction of emotional distress, (7) conspiracy to commit fraud, and (8) violation of the UCL.

Defendants moved for judgment on the pleadings, arguing Webre’s claims were barred by the statute of frauds and Webre failed to allege facts sufficient to support his other claims. Defendants requested judicial notice of the trust deeds, notices of sale, and related documents.

The trial court granted defendants’ request for judicial notice, and granted the motion for judgment on the pleadings without leave to amend. The court found the contract did not

³The complaint alleged six causes of action: (1) breach of contract, (2) breach of the covenant of good faith and fair dealing, (3) unjust enrichment/restitution, (4) violation of Business & Professions Code section 17200, (5) declaratory judgment, and (6) accounting.

provide for the extinguishment of the second trust deed. Thus Webre's first and second causes of action for breach of contract and breach of the covenant of good faith and fair dealing failed. Webre's third, fourth and fifth causes of action for fraud (intentional misrepresentation, negligent misrepresentation, and fraudulent concealment) failed to state causes of action because Webre failed to plead that defendants intended to defraud and the allegations were conclusory. The sixth cause of action for intentional infliction of emotional distress failed because Webre's allegations were conclusory. The seventh cause of action for conspiracy to commit fraud failed because it alleged insufficient facts and was conclusory and the eighth cause of action for violation of the UCL failed to the extent it was based on Webre's insufficient fraud allegations, and further failed because Webre did not allege he suffered any injury, namely, loss of property or other items of value.

DISCUSSION

A. Standard of Review.

A judgment on the pleadings in favor of the defendant is appropriate when the complaint fails to allege facts sufficient to state a cause of action. (Code Civ. Proc., § 438, subd. (c)(3)(B)(ii).) A motion for judgment on the pleadings is equivalent to a demurrer and is governed by the same de novo standard of review. (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 515.) All properly pleaded, material facts are deemed true, but not contentions, deductions, or conclusions of fact or law; judicially noticeable matters may be considered. (*Kapsimalis v. Allstate Ins. Co.* (2002) 104 Cal.App.4th 667, 672.)

B. Omission of Reporter's Transcript from the Record on Appeal is Not Fatal to Our Review.

Webre acknowledges the proceedings in the trial court were not recorded. He argues this is not fatal to his appeal. We agree.

An appellant may omit a reporter's transcript from the record on appeal if resolution of the appeal does not require consideration of any part of the oral proceedings (e.g., where the only oral proceedings were perfunctory arguments on pretrial motions, or the issues on appeal do not require review of the evidence). (Cal. Rules of Court, rule 8.130, subd. (a)(4); *Southern California Gas Co. v. Flannery* (2016) 5 Cal.App.5th 476, 483 [reporter's transcript may not be necessary if the appeal involves legal issues requiring de novo review].) The motion for judgment on the pleadings addresses the purely legal issue of whether Webre has stated a claim for relief. The omission of the reporter's transcript thus does not preclude our review.

C. Successive Motions for Judgment on Pleadings.

Webre argues the trial court erred procedurally in granting defendants' motion on the fraud claims. He argues defendants could not properly renew their motion under Code of Civil Procedure section 438, subdivision (g)(1), because they asserted the same grounds with respect to the fraud claims as they had in their first motion for judgment on the pleadings. The statutory motion for judgment on the pleadings does not lie on grounds previously raised by demurrer unless there has been a "material change in applicable case law or statute" since the demurrer was overruled. (Code of Civ. Proc., § 438, subd. (g)(1); see *Yancey v. Superior Court* (1994) 28 Cal.App.4th 558, 562, fn.1.) The statute addresses a motion for judgment on the pleadings filed after a

previous demurrer, but says nothing about a previous motion for judgment on the pleadings. As a result, it is inapplicable.

D. Webre's Claims Fail on the Merits.

Webre's theory of recovery is based entirely upon defendants' alleged breach of the alleged oral loan modification agreement. Pursuant to the oral agreement, his obligations under the first and second trust deed were consolidated, thereby eliminating the second trust deed. However, any such oral agreement is barred by the statute of frauds and is contrary to the terms of the written loan modification agreement. Because Webre's other claims are also premised upon the same theory, they too fail as a matter of law.

1. Breach of Oral Contract and the Statute of Frauds and Statute of Limitations.

A contract coming within the statute of frauds is invalid unless it is memorialized by a writing subscribed by the party to be charged. (Civ. Code, § 1624, subd. (a).) An agreement for the sale of real property or an interest therein is within the statute of frauds. (Civ. Code, § 1624, subd. (a)(3); *Secrest v. Security National Mortgage Loan Trust 2002-2* (2008) 167 Cal.App.4th 544, 552.) Further, a mortgage or deed of trust "can be created, renewed, or extended, only by writing, executed with the formalities required in the case of a grant of real property." (Civ. Code, § 2922; *Secrest, supra*, 167 Cal.App.4th at p. 552.) An agreement within the statute of frauds can only be modified by a written agreement. (Civ. Code, § 1698, subd. (c).) Thus, any purported oral modification agreement that extinguished the second deed of trust is barred by the statute of frauds. (Civ. Code, § 1624, subd. (a)(4), (6); *Jacobs v. Locatelli* (2017) 8 Cal.App.5th 317, 323–325.)

Furthermore, even assuming the oral agreement was enforceable, the two-year statute of limitations on an oral agreement had expired before Webre commenced this action. (Code of Civ. Proc., § 339, subd. (1).) The loan modification agreement was entered into in November 2013; this action was commenced in October 2016, more than two years later.

2. *Fraud Exception to Statute of Frauds.*

Webre argues the fraud exception to the statute of frauds permitting the introduction of parol evidence applies. (Civ. Code, § 1856, subd. (g); *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Association* (2013) 55 Cal.4th 1169, 1174–1175.) Here, the exception does not apply as Webre had an opportunity to read the written loan modification agreement. Although the loan number differed on the loan modification from any loan numbers that defendants had used previously in connection with the two trust deeds, and which Webre was familiar with, the written agreement clearly does not reference both trust deeds, nor does it reference a consolidation of the two loans. As a result, Webre cannot claim he reasonably relied on defendants' representations concerning the contents of the written agreement. Thus the exception does not apply. (*Id.* at p. 1183 [reliance must be reasonable for fraud exception to parol evidence rule to apply].)

3. *Fraud Claims (Intentional Misrepresentation, Negligent Misrepresentation, and Fraudulent Concealment).*

Webre argues he entered into the loan modification based upon defendants' representations it incorporated both the first and second deeds of trust; as a result, he has stated fraud-based claims. Further, he argues he pled these claims with specificity,

as he alleged facts regarding the persons making such representations to him.

The essential elements of a count for intentional misrepresentation are (1) a misrepresentation, (2) knowledge of falsity, (3) intent to induce reliance, (4) actual and justifiable reliance, and (5) resulting damage. *Chapman v. Skype, Inc.* (2013) 220 Cal.App.4th 217, 230–231.) The essential elements of a count for negligent misrepresentation are the same except knowledge of falsity is not required. Instead negligent misrepresentation requires a misrepresentation of fact by a person who has no reasonable grounds for believing it to be true. (*Id.* at p. 231.) “Each element in a cause of action for fraud or negligent misrepresentation must be factually and specifically alleged. [Citation.]” (*Cadlo v. Owens-Illinois, Inc.* (2004) 125 Cal.App.4th 513, 519.) The allegations must be sufficiently specific “to allow defendant to understand fully the nature of the charge made.” (*Roberts v. Ball, Hunt, Hart, Brown & Baerwitz* (1976) 57 Cal.App.3d 104, 109–110.) The plaintiff must allege specific facts not only showing he or she actually and justifiably relied on the defendant’s misrepresentations, but also how the actions he or she took in reliance on the defendant’s misrepresentations caused the alleged damages. (*Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1499.)

Here, Webre’s reliance on any statements made that contradicted the written loan modification was not reasonable. Webre at first refused to sign the documents because he was confused about the loan number. He was also presented with a written loan document that was radically different from the alleged oral agreement, yet he signed the written agreement. Given the circumstances, he should have been concerned the

second trust deed was not included in the loan modification agreement. Webre thus cannot plead he reasonably relied on terms that were contrary to the express terms of the written loan modification agreement. As a result, his misrepresentation claim fails.

4. *Declaratory Relief.* Webre alleges there is a controversy between the parties entitling him to declaratory relief that the second trust deed does not encumber the property. This claim fails because any declaratory relief claim is necessarily predicated on the unenforceable oral contract.

E. Webre's Proposed Third Amended Complaint

Webre further contends the court abused its discretion by failing to grant him leave to amend. Webre filed a request with this court to attach his proposed third complaint to his opening brief, although no such complaint was filed in the trial court. We denied the request. (*Citizens Opposing a Dangerous Environment v. County of Kern* (2014) 228 Cal.App.4th 360, 366 fn. 8 [documents not before trial court cannot be part of the record on appeal].) Thus, to the extent Webre's arguments pertain to the claims he asserted in the trial court with respect to his second amended complaint, we address them above. We do not address the arguments in his opening brief relating to claims asserted only in the proposed third amended complaint.

DISPOSITION

The judgment of the Superior Court is affirmed.
Respondents are to recover their costs on appeal.

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CURREY, J.

WE CONCUR:

MANELLA, P. J.

WILLHITE, J.